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No. 90-1362

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MAURICE S. WILSON,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church (hereinafter "Church"). Worldwide the Church has more than 6.6 million members, with some 760,000 in the United States.

For more than a century—many years before the first significant federal labor laws were enacted—the Church has taught its members to avoid entangling alliances through joining and financially supporting labor organizations, or working for oppressive employers. The Church bases these teachings on texts of Scripture that indicate Christ is to be the Lord of

one's life and the ultimate authority to which a believer will submit all decisions and relationships.

Beginning in 1965, the Church actively petitioned the Congress of the United States for an exemption from the membership and financial support requirements of the National Labor Relations Act. The Church's efforts were rewarded when Congress enacted a Conscience Clause permitting religious dissenters—in lieu of membership in, or financial support of a labor union—to pay a union dues equivalent to a neutral charity. See Section 19 of the National Labor Relations Act, 29 U.S.C. § 169.

The Sixth Circuit declared the Conscience Clause an unconstitutional establishment of religion. *Wilson v. NLRB*, 920 F.2d 1282 (6th Cir. 1990). In so doing, that court frustrated 15 years of legislative efforts by the Church to obtain an accommodation for its members from oppressive federal labor laws. Once the Church could have argued that federal labor law requiring membership in or financial support of a labor organization violated the free exercise clause of the first amendment under the three-part free exercise test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963). This Court, however, removed that protection in *Employment Div. of Oregon v. Smith*, 110 S. Ct. 1595 (1990). Unless the Sixth Circuit's decision is reversed, members of the Church will be forced to make the cruel choice between their livelihood or their religion.

The Church seeks to inform the Court of its role in the passage of Section 19 and to argue the constitutionality of that Section. Without the protection of Section 19, members of the Church will face re-

ligious discrimination in the work place imposed by a federal law without an adequate remedy.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Sixth Circuit opinion places in jeopardy legislative and judicial accommodations of religious beliefs and practices. Failure to reverse or otherwise limit that opinion will result in an erosion of other free exercise protections.

There are two valid reasons to question the Sixth Circuit's opinion. First, when Congress creates a burden on religious belief and practice, it can also provide the means to relieve such a burden. Efforts by the Church to obtain a legislative accommodation on behalf of its members through the enactment of a Conscience Clause to the NLRA is consistent with this principal and with this Court's decision in *Employment Div. of Oregon v. Smith*, 110 S. Ct. 1595 (1990).

Second, Section 19 of the NLRA can be construed so as to save it from an establishment of religion challenge. Such a construction would expand the religious exemption to include anyone who for personal religious reasons refuses to join or financially support a labor organization.

ARGUMENT

I. The Conscience Clause Sought a Legislative Accommodation for Religious Dissenters to Burdens Created by Federal Labor Laws

Since 1965 the Seventh-day Adventist Church has worked with other religious groups, Congress and labor organizations to obtain Conscience Clause protection for its members from certain provisions of the

National Labor Relations Act (NLRA). The Church's first major involvement with Congress was during efforts to repeal Section 14(b) of the NLRA. Representative Edith Green of Oregon championed the cause in the House of Representatives, while Senator Wayne Morse of Oregon did so in the Senate. Their "Conscience Clause" sought to protect members of the Seventh-day Adventist Church and certain other religious groups who—for religious reasons—could not join or financially support a labor union.

In 1974, Congress expanded the coverage of the NLRA to include not-for-profit hospitals. Responding to efforts by the Church on behalf of its members, Congress added a Conscience Clause. The religious exemption was limited to an "employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body or sect which has historically held conscientious objections to joining or financially supporting labor organizations." 29 U.S.C.A. Sec. 169. Six years later, Congress expanded this exemption to protect all employees covered by the NLRA. The Church actively pursued this legislative solution and played a central role in securing the enactment of the Conscience Clause as an accommodation for its members.

Sponsors of the Conscience Clause never intended to exclude from its protection unaffiliated persons whose personal religious beliefs prevented their joining or financially supporting labor organizations. However, respecting the fears of organized labor that less restrictive language would be abused by "free riders" without religious beliefs, no objection was made to the membership requirement.

The Church used the political process to obtain a religious accommodation for its members. This Court, in *Employment Div. of Oregon v. Smith*, 110 S.Ct. 1595 (1990), expressly permitted such a remedy. Justice Scalia, writing for the majority, directed those seeking protection of religious beliefs to the legislative process, observing: "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." 110 S. Ct. 1595 at 1606. Absent the protections once afforded by the "compelling state interest test" of *Sherbert v. Verner*, 374 U.S. 398 (1963) the Church must now rely on legislative solutions to legislatively created religious conflicts.

Of course, the idea of government accommodating a person's religious beliefs and practices from burdens created by the government is not new to this Court, nor was it first articulated in *Smith*. In his concurring opinion in *Sherbert*, Justice Stewart stated:

> I think that the guarantee of religious liberty embodied in the Free Exercise Clause *affirmatively requires* government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our constitution commands the positive protection by government of religious freedom-not only for a minority, however small—not only for the majority, however large—but for each of us. (Emphasis added.)

374 U.S. 398 at 415, 416 (1963).

Justice Harlan's dissent in *Sherbert* expressed a similar theme:

> [I]t would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant [who had been denied unemployment compensation because her religious beliefs prevented her from accepting work on Saturday, her Sabbath] . . . There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all embracing secularism.

374 U.S. 398 at 422.

The union security provisions of the NLRA impose a burden on persons who, for religious reasons, cannot join or financially support a labor organization. Having created the burden, there exists no reason why the government cannot act—indeed, it should do so affirmatively—to legislate an accommodation for such a person.

II. If Wilson's Beliefs Against Financially Supporting a Labor Organization are Truly Religious the Court Should Interpret Section 19 so as to Find it Constitutional

Section 19 served as a legislative solution to the needs of the Seventh-day Adventist Church and a handful of other religious groups that sought an accommodation to a federally created infringement of their free exercise rights. In this case, Wilson's refusal to join a union was based upon *personal* religious beliefs rather than the teachings of an organized re-

ligion of which he was a member. The Sixth
denied Wilson's effort to extend the protecti
Section 19 to include himself. It also found the
Section unconstitutional as an establishment
gion.

The Supreme Court can save Section 19 fr
tablishment of religion arguments by construi
language to avoid the constitutional concerns. S
different constructions are possible, any one of
would preserve the constitutionality of Secti
Indeed, to strike the Conscience Clause fro
NLRA on establishment grounds would contin
"crabbed" reading of the establishment clause
this Court has roundly condemned. *See Lynch v*
nelly, 465 U.S. 668, 687 (1984), and *Meek v. Pitt*
421 U.S. 349, 386 (1975) (Chief Justice Burge
curring in the judgment and dissenting in par

First, the legislative history of Section 19 d
strates that neither Congress nor the Presid
the United States intended to establish a relig
show a religious preference. Congressman Tho
who sponsored the legislation explained that the
bership requirement sought to prevent the exe
from being abused by unscrupulous persons as a
busting device. He also contended that paymen
dues equivalent would constitute a reasonable
modation under Section 2000e(j) of the Civil
Act of 1964. 126 Cong. Rec. H760 (daily ed. Fe
11, 1980).

President Carter, in signing the bill, stated:

> I want to emphasize that the language in th
> bill defining conscientious objection is *not*
> be construed in such a way as to discrimina

> among religions or to favor religious views over other views that are constitutionally entitled to the same status.

17 *Weekly Compilations of Presidential Documents: Administration of Jimmy Carter*, 2856 (1981). Clearly, the language was intended to serve as an accommodation under Title VII and to prevent union-busting activities. Neither Thompson nor President Carter intended Section 19 to be an establishment of a particular religion.

Another construction is suggested in *Welsh v. United States*, 398 U.S. 333 (1970). Faced with an exemption from military service for those who had a belief in a "Supreme Being," this Court expanded the definition of "Supreme Being" to include within the exemption those persons with strongly-held philosophical beliefs "akin to a belief in a supreme being" who were opposed to military service. Here, the membership requirements of Section 19 could be read to include personal religious beliefs held with the same sincerity as one who is a member of an organization described in this Section.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court considered whether the National Labor Relations Board had jurisdiction over teachers in religious schools. Relying on Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 6 U.S. 64 (1804), that an act of Congress ought not be construed to violate the Constitution if any other possible construction remains possible, the Court avoided the constitutional dilemma by concluding that Congress did not intend to include church school teachers within the Board's jurisdiction. The intent of Congress in enacting Sec-

tion 19 could be construed to include all persons who have personal religious reasons against joining or financially supporting a labor organization. Such a construction, would save Section 19 from establishment of religion charges.

In yet another construction, the Court could find that the questioned language of Section 19 is a permissible preference of one religion over another. In *Larson v. Valente*, 456 U.S. 228, 246-248 (1982), the Court suggested that denominational preferences can be validated if there exists a compelling governmental interest. While any such statute must be closely fitted to further that interest, the accommodation of a free exercise right burdened by federal law represents such a compelling governmental interest.

The Supreme Court itself has on several occasions approved the concept of accommodating the free exercise of religion. See *Zorach v. Clauson*, 343 U.S. 306 (1952); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Gillette v. United States*, 401 U.S. 437 (1971); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *United States v. Lee*, 455 U.S. 252 (1982). The Court has even accommodated the free exercise of religion in circumstances where tension existed between the Free Exercise and Establishment Clauses of the first amendment. See *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

Justice O'Connor, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), suggests one last saving construction of Section 19. She acknowledges the tension between the free exercise and establishment of religion clauses. She rejects, however, the notion of "complete neutrality" in the government's relationship toward religion. Instead, O'Connor seeks to identify workable

limits to the government's interest in promoting the free exercise of religion. Thus:

> [G]overnment pursues Free Exercise Clause values when it lifts a governmental burden on the free exercise of religion . . . It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.

472 U.S. 38, 83. Under such a construction, Section 19 properly promotes the free exercise of religion by removing a burden imposed by Congress on certain religious practices.

Section 19 is not an establishment of religion. Rather, it is a congressional effort to lift a burden placed on religious belief and practice by Congress itself. Section 19 can be construed by this Court in a manner to save the statute from claimed constitutional infirmities.

CONCLUSION

The Seventh-day Adventist Church played a central role in securing the passage of Section 19. While it sought protection for all persons with religious objections to joining or financially supporting a labor union, the final legislation was more narrowly focused.

The Church asks this Court to save Section 19 from constitutional attack. This can be accomplished by finding Section 19—as permitted by *Employment Div. of Oregon v. Smith*—a permissible political solution to the need for an accommodation of a federally created religious infringement. Alternatively, the language of Section 19 can be construed to include all persons

who have religious convictions against membership in or financial support of a labor organization.

The General Conference of Seventh-day Adventists respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,

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